Supreme Court, U.S.
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No. ____

IN THE

Supreme Court of the United States

THE GOODYEAR TIRE & RUBBER COMPANY,
Petitioner,

v.

FREDERIC V. MALEK,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does a federal magistrate have jurisdiction to act in a case when the clerk's office assigns the case directly to the magistrate—as opposed to assigning the case to an Article III district judge who can then *refer* the matter to the magistrate—as required by Article III of the Constitution, the Federal Magistrates Act, and the Rules of Civil Procedure?

2. Under the Federal Magistrates Act, an appeal from a magistrate's ruling on a dispositive matter with the parties' consent is to the Court of Appeals for the Circuit within which the magistrate sits. In this case, was Petitioner's appeal to the Fourth Circuit appropriate given that the magistrate's ruling is on an issue dispositive in this case and this route of review was the "closest" to the routes of review set forth in the Magistrates Act and Rules of Civil Procedure?

STATEMENT PURSUANT TO RULE 29.6

Petitioner is a publicly held Ohio corporation with no parent companies. There are no companies holding 10% or more of Petitioner's stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this case on August 6, 2003.

OPINIONS BELOW

The lower courts' opinions are set forth in orders. The Magistrate Judge denied Petitioner's Motion to Quash by Order entered April 30, 2003, and compelled Rowan & Blewitt to produce the subpoenaed documents and a Rule 30(b)(6) witness. (A. 6-7a.) The Magistrate Judge stayed the effect of that Order pending appeal by Order entered May 29, 2003. (A. 4-5a.) The Fourth Circuit dismissed Petitioner's

appeal by Order entered August 6, 2003 (A. 2-3a), and denied its Petition for Rehearing or Rehearing *en Banc* by Order entered September 23, 2003. (A. 1a.) None of the lower courts' rulings are reported.

JURISDICTION

Judgment was entered in the District Court on April 30, 2003. (A. 6a.) Judgment was entered in the Court of Appeals on August 6, 2003. (A. 2a.) A timely Petition for Rehearing or Rehearing *en Banc* was denied September 23, 2003. (A. 1a.) This Court has jurisdiction pursuant to Section 1254(1) of the Judicial Code, 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

Section 1 of Article III of the United States Constitution, the Fifth Amendment to the United States Constitution, Sections 132, 137, 636, and 1631 of the Judicial Code, and Rules of Civil Procedure 72 and 73 are reproduced in the Appendix at pp. 10-25a.

STATEMENT OF THE CASE

This case is ancillary to a case pending in the District of Colorado in which a group of homeowners—including Respondent—filed suit against Goodyear. *Malek v. Goodyear Tire & Rubber Co.*, No. 02-B-1772 (D. Colo.). Plaintiffs in that case seek property damages due to an alleged failure of Entran II hose manufactured by Goodyear that was used as a component part in radiant in-floor heating systems.

The case coming to this Court was commenced by Petitioner as a miscellaneous action to quash a subpoena Respondent issued out of the Eastern District of Virginia to obtain documents and other materials from Rowan & Blewitt, a public relations/litigation support firm Petitioner hired in connection with the nationwide litigation involving Entran II hose.

By Order dated August 6, 2003, the Fourth Circuit (Widener, Traxler & Hamilton, JJ.) dismissed Goodyear's appeal, holding that the magistrate's April 30, 2003, Order from which the appeal was taken is "nondispositive" and was required to be appealed first to the District Court within ten days. (A. 2a.) By that, the panel overlooked significant legal issues and the ruling stands in direct conflict with decisions from another panel in that Circuit and decisions from other Circuits because:

1. The case below was never assigned to an Article III judge and then referred to a magistrate as required by the Constitution, the Federal Magistrates Act, 28 U.S.C. § 631 *et seq.*, and the Rules of Civil Procedure as a prerequisite before a magistrate can exercise jurisdiction;

2. the magistrate's April 30 Order is fully "dispositive" in this case, leaves absolutely nothing further to be resolved, and the clerk of court on the same date marked on the docket "case closed";

3. the most appropriate route of appeal was to the Court of Appeals and not the District Court because the magistrate's April 30 ruling was indeed dispositive and because it was not a "report and recommendation"; and

4. Goodyear's notice of appeal was in fact filed with the District Court within ten days of the April 30 Order to "cover all bases" so that if it is determined that an appeal must first be considered by the District Court, the proper recourse is to deem the appeal pending in that Court, not dismiss the appeal outright.

Indeed, given how the District Court clerk's office mishandled the assignment of this matter, and given the action the magistrate thereafter took, Goodyear took every

step possible to protect its rights. To dismiss the appeal outright was so grossly unfair that it would constitute a deprivation of procedural due process.

Accordingly, if this Court concludes that an appeal to the District Court is the appropriate route of appellate review—notwithstanding the fact that the case was never assigned to a district judge and then referred to a magistrate, notwithstanding the fact that the issue resolved by the April 30 Order is indeed "dispositive," and notwithstanding the fact that an appeal was filed in the District Court within ten days—the appropriate course of action is to remand to the District Court with instructions that the appeal lies in that court. *See* 28 U.S.C. § 1631; *cf.* FED. R. APP. P. 4(d).

A writ of certiorari is appropriate because these material points of law were not even addressed by the Court of Appeals in its August 6 or September 23 Orders and its decision is directly contrary to other authority, such as the Fourth Circuit's decision in *Dixon v. Francis*, 2001 U.S. App. LEXIS 2774 (4th Cir. Feb. 26, 2001), and the Ninth Circuit's decision in *Reynaga v. Cammisa*, 971 F.2d 414 (9th Cir. 1992), as discussed below.

A. Litigation Involving "Entran II" Hose

Respondent Frederic Malek is one of a number of plaintiffs in *Malek v. Goodyear Tire & Rubber Co.*, No. 02-B-1772 (D. Colo.). Plaintiffs in that case seek various types of property damages due to an alleged defect in Goodyear's "Entran II" hose that was installed in their homes, buildings, or other structures. Entran II is a rubberized hose used in hydronic radiant in-floor heating systems manufactured by the Chiles Power Supply Company, *d/b/a* Heatway Systems.

A number of similar cases have been filed against Goodyear throughout the United States, including cases in New England, New Mexico, New York, Michigan, California, Pennsylvania, and New Jersey. Respondent's

attorneys in this case—Holland & Hart—are lead counsel in a number of the other lawsuits.

B. Goodyear's Retention of Rowan & Blewitt

In June of 2000, after 19 lawsuits had been filed against it involving Entran II, Goodyear and its national counsel at the time retained the public relations firm of Rowan & Blewitt to provide litigation support. Goodyear's attorney explained the nature of and basis for that retention in an affidavit submitted below:

> Because Rowan & Blewitt was retained after litigation involving Entran II hose had been commenced against Goodyear, one of its functions was to act essentially as an in-house public relations department with respect to the litigation and in that regard to provide advice and guidance on how (a) Goodyear and its attorneys could attempt to counter and combat the stigma that Plaintiffs' attorneys were attempting to create with regard to the presence of Entran II, while (b) at the same time ensuring that those public relations activities did not in any way adversely impact on Goodyear's defense in the litigation.

C. The Subpoena Issued in *Payne v. Goodyear*

The attorneys from Holland & Hart representing Respondent in this case also represent the plaintiffs in *Payne v. Goodyear*, No. 01-10118-NG (D. Mass.). Plaintiffs in that case seek certification of a class of all homeowners in the six New England states who have Heatway systems with Entran II hose.

Plaintiffs in *Payne v. Goodyear* issued two subpoenas to Rowan & Blewitt out of the Eastern District of Virginia, the district in which Rowan & Blewitt's main office is located. By those subpoenas, Plaintiffs sought essentially everything in Rowan & Blewitt's files relating to the litigation support it

provided Goodyear and its attorneys, as well as deposition testimony of a witness pursuant to Federal Rule of Civil Procedure 30(b)(6).

Goodyear and Rowan & Blewitt sought to quash the subpoena because it seeks material Goodyear claims is protected under its attorney-client and work-product privileges. To do that, Goodyear commenced a miscellaneous action in the Eastern District of Virginia and moved to quash the subpoena. *Goodyear v. Payne*, No. 02-MC-51 (E.D. Va.).

The docket in that case indicates that the matter was assigned to District Judge Leonie Brinkema and that she assigned Goodyear's Motion to Quash to Magistrate Poretz. By Order dated November 15, 2002, Magistrate Poretz granted Goodyear's Motion to Quash and Motion for an Emergency Protective Order. (A. 8-9a.) The apparent basis for quashing the subpoena was that the deposition and document production was listed to take place outside the Eastern District of Virginia, the issuing Court. The homeowners never appealed, however, and the Protective Order remains in effect.

D. The Subpoena Issued in *Malek v. Goodyear*

On February 3, 2003, Plaintiffs in *Malek v. Goodyear* issued another subpoena out of the Eastern District of Virginia, this time with the deposition noticed to take place in McLean, VA. Plaintiffs sought exactly what was sought by the previous subpoenas and the document requests are identical.

Goodyear again filed a miscellaneous action and moved to quash the subpoena on the grounds that the material sought is privileged. *Goodyear v. Malek*, No. 03-MC-08 (E.D. Va.). Goodyear also argued that the subpoenaed materials are protected by the November 15 Protective Order issued in *Goodyear v. Payne* that was never appealed.

According to the docket, the Miscellaneous Action in *Goodyear v. Malek* was assigned directly to Magistrate Poretz by the clerk of court, as opposed to an Article III district judge. After the subpoenaed documents were submitted *in camera* with a privilege log and full briefing, Magistrate Poretz denied Goodyear's Motion by Order dated April 30, 2003, and compelled "Rowan & Blewitt to produce the requested documents and witness for deposition." (A. 7a.) On May 8, 2003—eight days later—Goodyear filed a Notice of Appeal in the District Court to the Fourth Circuit.

By Order dated August 6, the Court of Appeals dismissed Goodyear's appeal on the grounds that: (a) the April 30 Order involves a nondispositive matter; (b) such orders must first be appealed to the District Court within ten days; and (c) the April 30 Order was not first appealed to the District Court. (A. 2-3a.) The Fourth Circuit denied Goodyear's Petition for Rehearing or Rehearing *en Banc*. (A. 1a.)

E. Subject Matter Jurisdiction Below

Subject matter jurisdiction in *Malek v. Goodyear*, No. 02-B-1772 (D. Colo.), is based on diversity of citizenship. 28 U.S.C. § 1332(a)(1). The subpoena issued against Rowan & Blewitt was issued out of the Eastern District of Virginia. Goodyear filed a miscellaneous action and moved to quash the subpoena under that Court's ancillary jurisdiction. FED. R. CIV. P. 45(c)(3)(A).

REASONS FOR GRANTING THE WRIT

I. MAGISTRATE PORETZ LACKED JURISDICTION TO ENTER THE APRIL 30 ORDER

The Federal Magistrates Act, 28 U.S.C. § 631 *et seq.*, and Rules of Civil Procedure provide that magistrates can be referred matters in several ways, including: **(1)** nondispositive matters without the parties' consent, 28 U.S.C. § 636(b)(1)(A) & FED. R. CIV. P. 72(a); **(2)** dispositive

matters without the parties' consent, 28 U.S.C. § 636(b)(1)(B) & FED. R. CIV. P. 72(b); and **(3)** dispositive matters with the parties' consent, 28 U.S.C. § 636(c) & FED. R. CIV. P. 73. As explained below, each of these instances in which a magistrate obtains jurisdiction requires very specific things to occur and each implicates a different right of review.

As further explained, Magistrate Poretz never obtained jurisdiction to act in this matter and his April 30 Order is a legal nullity. As a result, the case should be remanded with direction that his April 30 Order be vacated. The Fourth Circuit's August 6 and September 23 Orders do not even address these procedural and jurisdictional defects. In fact, these defects are so patent and fundamental that this Court can and should vacate the Fourth Circuit's and District Court's rulings based on this Petition alone without the need for formal briefing.

A. Nondispositive Matters Without Consent: Section 636(b)(1)(A) and Rule 72(a)

For a magistrate to have jurisdiction over a nondispositive pretrial matter in a case, a number of things must occur, including: (a) the case—like every case filed in federal court—must initially be assigned to an Article III district judge[1]; and (b) the district judge must then "designate" a magistrate to hear a matter and "refer" the matter to him or her.[2] If those two things occur, an "appeal" of the ruling can be taken to the district judge to whom the case is assigned within ten days.[3]

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[1] U.S. CONST. Art. III, § 2; 28 U.S.C. § 132 (creation of the District Courts); 28 U.S.C. § 137 (designation and assignment of cases among district judges).

[2] 28 U.S.C. § 636(b)(1)(A) ("a judge may designate a magistrate . . . ."); FED. R. CIV. P. 72(a) ("A magistrate judge to whom a pretrial matter . . . is referred . . . .").

[3] 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72(a) (a party can file

In its August 6 Order, the Fourth Circuit in this case indicates that it believes this appeal is procedurally defective because the April 30 Order is nondispositive and an appeal was not taken first to the District Court. (A. 2a.) The panel's finding is clearly erroneous. First, none of the things required to confer jurisdiction on Magistrate Poretz occurred and he acted *ultra vires*. Second, the April 30 Order is a "dispositive" order and resolved all issues presented in *Goodyear v. Malek*. And third, an appeal was in fact filed in the District Court within ten days of the April 30 Order, albeit to the Court of Appeals.

1. *The Case Was Never Assigned to a District Judge and Then Referred to Magistrate Poretz*

First, the miscellaneous action *Goodyear v. Malek* was never assigned to an Article III district judge. Instead, at the very top of the docket, the clerk of court notes that the case was "[a]ssigned to: Magistrate Judge Barry R. Poret [sic]." The fifth and thirteenth docket entries likewise indicate that no district judge was ever assigned: "NOTICE of Hearing: Motion Hearing Deadline before Judge Unassigned . . . . ."

According to the clerk's office, the reason the case was assigned directly to a magistrate and not a district judge is because it viewed the case as simply a discovery dispute and magistrates generally hear discovery matters. If this was in fact the case, it is mysterious why District Judge Brinkema was assigned to the miscellaneous action in *Goodyear v. Payne*—and then referred it to Magistrate Poretz as required by Article III, the Magistrates Act, and the Rules of Civil Procedure—given that it involved essentially identical papers.

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objections to a magistrate's ruling within ten days to "[t]he district judge to whom the case is assigned . . . .").

The assignment of the case directly to Magistrate Poretz renders his April 30 Order a nullity because the case was never assigned to a district judge and not then referred to a magistrate, both of which are required for a magistrate to take jurisdiction. In other words, the Constitution, the Federal Magistrates Act, and the Rules of Civil Procedure were all simply *bypassed*, rendering the April 30 Order by Magistrate Poretz a legal nullity.

Case law is directly on point. For example, in *Dixon v. Francis*, 2001 U.S. App. LEXIS 2774 (4th Cir. Feb. 26, 2001), a magistrate terminated a civil action and an appeal was taken to the Fourth Circuit. That Court reversed for lack of jurisdiction, but vacated the magistrate's dispositive ruling because she lacked jurisdiction as well: "In this case, we find nothing in the record showing that the parties agreed to have Dixon's complaint decided by the magistrate judge. As a result, the magistrate judge lacked authority to enter a final order terminating the case." *Id.* at **2.

The Ninth Circuit reached the same conclusion in *Reynaga v. Cammisa*, 971 F.2d 414 (9th Cir. 1992). In that case, plaintiff filed suit in the District Court and the case was—according to the docket—assigned to a district judge and referred to a magistrate. On appeal, the Ninth Circuit held that the magistrate's order was a legal nullity for certain reasons discussed below. The Court's observations as to the assignment to the magistrate, however, are directly applicable in this case:

> Although the district court's docket sheet indicates that Reynaga's action was "assigned" to Judge Shubb and "referred to" Magistrate Hollows, the record contains no order from the district judge authorizing the magistrate to exercise jurisdiction in that action. If no such order, specific or general, exists, the magistrate was not permitted to participate in *any* way in Reynaga's action.

971 F.2d at 415 n.1 (emphasis in original).

The Ninth Circuit's observation in *Reynaga* states the obvious—magistrates are not Article III district judges, they may not act in a case unless specifically assigned the authority to do so by a district judge, and any action they take without proper assignment is without legal effect.

In this case, Magistrate Poretz's jurisdiction is not even in question—unlike *Reynaga*, the docket in *Goodyear v. Malek* is abundantly clear that a district judge was never even assigned to the case and Goodyear's Motion to Quash was never "referred" to Magistrate Poretz. The April 30 Order must be vacated for lack of jurisdiction.

2. *Magistrate Poretz's April 30 Order Resolved a "Dispositive" Issue in This Case*

Even if this case had been assigned to a district judge and then referred to Magistrate Poretz, the April 30 Order does not involve a "nondispositive" issue. To the contrary, the sole issue presented in *Goodyear v. Malek* is whether the documents and testimony sought by the subpoena are privileged or otherwise discoverable. That issue was presented by Goodyear's Motion to Quash and once that issue was purportedly resolved by the April 30 Order, absolutely nothing remained to be decided in the case.

This was recognized by the clerk's office, which made the following entry in the docket on April 30: "Case closed (kjon)." And again at the end of the docket: "CLOSED." When a case is closed, nothing remains to be resolved and the final order causing the case to be closed can be nothing other than dispositive. *American Stock Exch. v. Mopex, Inc.*, 215 F.R.D. 87, 92 (S.D.N.Y. 2002) ("A ruling is 'dispositive' if it resolves substantive claims for relief rather than mere issues in the litigation.").

Again, case law is directly on point. In *NLRB v. Frazier*, 966 F.2d 812 (3d Cir. 1992), a magistrate (who unlike Magistrate Poretz was referred the matter) denied the NLRB's application to enforce a subpoena. On appeal to the District Court, the denial of the enforcement action was deemed a nondispositive motion and treated accordingly for purposes of appeal. The Third Circuit disagreed, holding that resolution of a discovery action collateral to an ancillary action is dispositive and final because it terminates all the issues presented:

> The proceeding to enforce an agency subpoena is like a motion to dismiss; once the court grants a motion to dismiss or compels compliance with a subpoena, the court disposes of the entire case before it. . . . [I]n a proceeding to enforce a subpoena, the case before the district court is over regardless of which way the court rules. Once the court grants or quashes the agency subpoena, it determines with finality the duties of the parties. The district court proceeding is admittedly collateral to the Board's pending administrative proceeding, but the question of whether or not to enforce the subpoena is the only matter before the court. The court's decision seals with finality the district court proceeding and is subject to appellate review.
>
> . . . The magistrate judge's decision was not a pretrial determination of a motion collateral to the main proceeding before the district court, but a final decision which disposed entirely of the Board's business before the court. The district court should have reviewed the magistrate judge's decision accordingly.

966 F.2d at 817-18. Other decisions are in accord and discovery orders in ancillary actions directing an entity not a party to the main action are deemed dispositive. *See, e.g., In re Oral Testimony of a Witness*, 182 F.R.D. 196, 201-02

(E.D. Va. 1998) (following *NLRB v. Frazier*, although noting that the Fourth Circuit has not addressed the issue).

3. *An Appeal Was Filed in the District Court Within Ten Days of the April 30 Order*

Even if this case had been assigned to a district judge, even if that district judge had referred Goodyear's Motion to Quash to Magistrate Poretz, and even if that Motion presented a nondispositive issue—none of which occurred—Goodyear filed a Notice of Appeal in the District Court within ten days of the April 30 Order. As a result, if this Court were to conclude that the appeal properly lies in the District Court, it should simply remand with direction that that court take jurisdiction. *See* 28 U.S.C. § 1631 (a case or appeal should be transferred from one court to another if there is a want of jurisdiction and if such transfer is in the interest of justice); *Willis v. Bank of Am.*, No. 98-15027, 1998 U.S. App. LEXIS 31478 (9th Cir. Dec. 11, 1998) (transferring a magistrate's ruling under Section 1631 to the district court to be vacated); *Batiste v. Catoe*, 2001 U.S. App. LEXIS 23425 (4th Cir. Oct. 30, 2001) (effectively the same); *cf.* FED. R. APP. P. 4(d) (notice of appeal filed in the court of appeals will be transferred to the district court clerk and deemed filed there).

Indeed, Goodyear took the most reasonable route of appeal available given the clerk's office's erroneous assignment directly to a magistrate. First, to whom would Goodyear have appealed the April 30 Order at the district court level given that no district judge had ever been assigned to the case? Second, given that Goodyear's Motion to Quash presented a dispositive issue, the proper recourse for the magistrate was to issue a report and recommendation, not a final order. 28 U.S.C. § 636(b)(1)(B); FED. R. CIV. P. 72(b). He did not issue a report and recommendation, but rather issued a final and dispositive order compelling production of certain materials, a violation of which could result in contempt sanctions.

To put Goodyear in a worse position, the April 30 Order does not compel Goodyear to produce documents it claims are privileged, but rather compels Rowan & Blewitt to produce such materials. If the April 30 Order compelled Goodyear to produce the documents, an argument can be made that it should bear the risk of being held in contempt for not complying with the Order, and then seek appellate review:

> The general rule [set forth in *Alexander v. United States*, 201 U.S. 117 (1906)] persists that appeal cannot be taken from an ancillary proceeding. It has been explained on grounds similar to those advanced in other discovery settings to justify insistence on the disobedience and contempt path of review. The hazards of contempt will encourage all parties to reconsider their positions, and with respect to oral depositions will flesh out the record by establishing the precise questions to be answered.

15B CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3914.24, at 174 (2d ed. 1992) (footnotes omitted).

But that is not the case when a third party is compelled to produce materials that infringe upon another's rights and privileges. In other words, it is unlikely Rowan & Blewitt will be nearly as willing to confront contempt proceedings to protect Goodyear's privileges.

Third, and as discussed below, the only avenue by which a magistrate can resolve a dispositive issue by order—as opposed to report and recommendation—is by consent of the parties under Section 636(c)(1) and Rule 73. The right of appeal from such an order is directly to a Court of Appeals under Section 636(c)(3) and Rule 73(c), which is precisely what Petitioner did in this case.

And while the parties never expressly consented to have Magistrate Poretz resolve anything in this case, this was

procedurally the "closest" to what occurred because: (a) Magistrate Poretz resolved the same issue in *Payne*; and (b) the parties agreed to have Goodyear's Motion to Quash in *Malek* listed for hearing on March 21, 2003, because the scheduling calendar put it before Magistrate Poretz. In other words, Goodyear took the most appropriate route of appeal because what occurred below is closest to: (a) a magistrate's decision on a dispositive issue; (b) by final order as opposed to a report and recommendation; and (c) with the parties' consent. 28 U.S.C. § 636(c) & FED. R. CIV. P. 73. Such an appeal lies directly in the Courts of Appeals and it was clearly erroneous for the Fourth Circuit to dismiss Goodyear's appeal.

Given how the clerk of court completely mishandled the assignment of this case, Goodyear has taken the best course of appellate review under the circumstances. The proper recourse at this stage is for this Court to remand with direction that the April 30 Order be vacated and direct the clerk of court to assign the case to a district judge as is Goodyear's right under the Constitution and the United States Code. Alternatively, if the Court believes that review lies first in the District Court, it should remand with direction that that court take the case given that Goodyear filed a notice of appeal within eight days of the magistrate's ruling.

B. Dispositive Matters Without Consent: Section 636(b)(1)(B) and Rule 72(b)

For a magistrate to have jurisdiction over a dispositive matter in a case without the parties' consent, a number of things must occur, including: (a) the case must be assigned to an Article III district judge, *supra* n.1; and (b) the district judge must then "designate" a magistrate to rule on a matter and "assign" the matter to it, 28 U.S.C. § 636(b)(1)(B); FED. R. CIV. P. 72(b). If those two things occur, the magistrate may issue a report and recommendation, to which the parties can submit challenges to the district judge assigned to

the case within ten days. 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72(b).

As explained above, this case was never assigned to a district judge and no district judge ever referred the case to Magistrate Poretz. As a result, he had no jurisdiction to issue the April 30 Order and it is a legal nullity.

In addition, Goodyear's Motion to Quash presents an issue dispositive of all the issues in this case. As a result, even if Magistrate Poretz had jurisdiction to address Goodyear's Motion to Quash, he only had jurisdiction to issue a report and recommendation, not a final order compelling production of privileged materials. Indeed, he has issued such reports in the past[4] and the reason he was unaware that Goodyear's Motion to Quash is dispositive may simply be that the Motion was not *referred* to him by an Article III district judge. As the Court held in *Reynaga*:

> Here, however, the magistrate did not recommend the imposition of a stay; rather, he *imposed* it himself. That order was beyond the magistrate's authority: it was beyond his jurisdiction and was, in essence, a legal nullity.

971 F.2d at 417 (emphasis in original).

Finally, even if this case had been assigned to a district judge, even if that district judge had referred Goodyear's Motion to Quash to Magistrate Poretz, and even if Judge Poretz had issued a report and recommendation instead of a final order, Goodyear filed a Notice of Appeal within ten

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[4] *See, e.g., Jack in the Box v. Jackinthebox.org*, No. 00-913-A, 2001 U.S. Dist. LEXIS 9583, at *17-18 (E.D. Va. Apr. 17, 2001) (Poretz, M.J.) ("The parties are advised that exceptions to this Report and Recommendation pursuant to 28 U.S.C. § 636 and Fed. R. Civ. P. 72(b) must be filed within ten (10) days after service."), *adopted*, 143 F. Supp. 2d 590 (E.D. Va. 2001).

days of the April 30 Order. If this Court were to conclude that the appeal properly lies in the District Court, it should simply order that the case be transferred to that Court pursuant to 28 U.S.C. § 1631.

C. Dispositive Matters with Consent: Section 636(c) and Rule 73

For a magistrate to have jurisdiction over a dispositive matter by the parties' consent, a number of things must occur, including: (a) the case must be assigned to an Article III district judge, *supra* n.1; (b) the district judge must then "specially designate" a magistrate to resolve an issue, 28 U.S.C. § 636(c)(1); FED. R. CIV. P. 73(a); and (c) the parties must specifically consent in writing, 28 U.S.C. § 636(c)(1); FED. R. CIV. P. 73(b). If those three things occur, a magistrate's ruling is directly appealable to the Court of Appeals for the Circuit within which he or she sits. 28 U.S.C. § 636(c)(3); FED. R. CIV. P. 73(c).

Again, Magistrate Poretz lacked jurisdiction to issue the April 30 Order because the case was never assigned to a district judge, he was never specially designated to rule on anything, and the parties never expressly consented to his deciding the case. And again, his ruling is a nullity. *Parks v. Collins*, 761 F.2d 1101, 1106 (5th Cir. 1985) (magistrate lacked authority to act under Section 636(c) because there was no "order of reference from the district judge" and no indication that the parties consented to have the magistrate decide the motion); *Henry v. Tri-Services*, 33 F.3d 931, 933 (8th Cir. 1994) (same); *Columbia Record Prods. v. Hot Wax Records*, 966 F.2d 515, 517 (9th Cir. 1992) (same).

Had those things occurred, however, the appeal in the Fourth Circuit was proper. And as also explained above, this is the "closest" to what occurred in this case because the April 30 Order addresses a dispositive issue and is not a

report and recommendation, something that can only take place under Section 636(c) and Rule 73.

II. THIS ISSUE IS IMPORTANT

"Communications between officers and employees of the same entity relayed to corporate counsel for the purpose of obtaining legal advice are entitled to the attorney-client privilege." *Virginia Elec. & Power Co. v. Westmoreland-LG&E Partners*, 526 S.E.2d 750, 755 (Va. 2000). As this Court has explained, the attorney-client privilege is the oldest and most revered of all the privileges:

> The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client.

Upjohn Co. v. United States, 449 U.S. 383, 389 (1981) (citation omitted).

The attorney-client privilege is not limited to communications between the attorney and the client. To the contrary, communications between attorneys and their clients to and from independent contractors for the client—such as public relations/litigation management firms such as Rowan & Blewitt—are equally protected under the privilege. Case law is directly on point.

For example, in *In re Copper Market Antitrust Litigation*, 200 F.R.D. 213 (S.D.N.Y. 2001), the Court was presented with the same issue and concluded that such evidence was protected by the attorney-client privilege. In that case, a Japanese corporation was involved in antitrust litigation involving global copper pricing. The corporation hired a

public relations corporation to help "damage control, *i.e.*, the management of press statements in the context of anticipated litigation to ensure that they do not themselves further damage the client." *Id.* at 215-16 (internal quotations omitted). The public relations firm's role was to "help the Company make the statements it needed to make, but to do so within the necessary legal framework—all with the realization, indeed the expectation, that each such statement might subsequently be used by Sumitomo's adversaries in litigation." *Id.* at 216 (internal quotations omitted).

As in this case, Plaintiffs in *Copper Market* issued a subpoena for various documents developed by the public relations firm and the Japanese corporation moved to quash the subpoena, arguing that the documents were privileged under the attorney-client and work-product privileges. The Court agreed, finding that the public relations firm was part of the attorney-client communication link:

> RLM was, essentially, incorporated into Sumitomo's staff to perform a corporate function that was necessary in the context of the government investigation, actual and anticipated private litigation, and heavy press scrutiny obtaining at the time. Sumitomo retained RLM to deal with public relations problems following the exposure of the copper trading scandal. Sumitomo's internal resources were insufficient to cover the task. RLM's public relations duties included preparing statements for public release and internal documents designed to inform Sumitomo employees about what could and could not be said about the scandal. . . . In formulating communications on Sumitomo's behalf, RLM sought advice from Sumitomo's counsel and was privy to advice concerning the scandal and attendant litigation.
>
> * * * * *
>
> The Court therefore finds that, for purposes of the attorney-client privilege, RLM can fairly be equated

> with the Sumitomo for purposes of analyzing the availability of the attorney-client privilege to protect communications to which RLM was a party concerning its scandal-related duties. Accordingly, confidential communications between RLM and Sumitomo's counsel, or between RLM and Sumitomo, or among RLM, Sumitomo's in-house counsel and Paul Weiss that were made for the purpose of facilitating the rendition of legal services to Sumitomo can be protected from disclosure by the attorney-client privilege.

200 F.R.D. at 219 (citation omitted); *see also In re Grand Jury Subpoenas Dated March 24, 2003*, (S.D.N.Y. 2003).

If the Fourth Circuit's dismissal of the appeal in this case is allowed to stand, it will extinguish Petitioner's privileges forever because once privileged materials are disclosed, the privileges are gone:

> Undergirding those previous holdings is the notion that, once putatively protected material is disclosed, the very "right sought to be protected" has been destroyed. That is so because, as we noted previously, underlying the attorney-client privilege is the policy of encouraging full and frank communications between an attorney and client, without the fear of disclosure, so as to aid in the administration of justice. Concomitantly, the work product doctrine is designed to promote the adversarial process by maintaining the confidentiality of documents prepared by or for attorneys in anticipation of litigation. Appeal after final judgment cannot remedy the breach in confidentiality occasioned by erroneous disclosure of protected materials. At best, on appeal after final judgment, an appellate court could send the case back for re-trial without use of the protected materials. At that point, however, the cat is already out of the bag.

In re Ford Motor Co., 110 F.3d 954, 963 (3d Cir. 1997) (internal quotations omitted) *see also id.* ("Attorneys cannot unlearn what has been disclosed to them in discovery" and

"there is no way to unscramble the egg scrambled by disclosure . . . ."); *Fawcett v. McRobert*, 326 F.3d 491, 496 (4th Cir. 2003) (same).

Under this Court's Rule 10, a writ of certiorari should issue to resolve what appears to be a fundamental misunderstanding by district courts within the United States on an important issue of federal law—Article III of the Constitution and various provisions of the Judicial Code require that Article III district judges be assigned to cases when they are filed, as opposed assigning them directly to magistrates who have not gone through the nomination and confirmation process and allowing them to handle the case "soup to nuts." Petitioner has the right under Article III of the Constitution to have a district judge hear this matter and that right has been completely ignored.

CONCLUSION

For the reasons set forth above, The Goodyear Tire & Rubber Company respectfully requests that this Court issue a writ of certiorari to the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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